Alaska Wilderness League ◘ American Lands Alliance ◘ American Rivers ◘ American Wildlands ◘ Biodiversity Conservation Alliance ◘ Californians for Western Wilderness ◘ Center for Biological Diversity ◘ Coalition for the Valle Vidal ◘ Defenders of Wildlife ◘ Earthjustice ◘ Environmental Defense ◘ Forest Guardians ◘ Great Old Broads for Wilderness ◘ Los Padres ForestWatch ◘ National Audubon Society ◘ National Environmental Trust ◘ National Trust for Historic Preservation ◘ National Wildlife Federation ◘ Natural Resources Defense Council ◘ Oceana ◘ The Ocean Conservancy ◘ Oregon Natural Desert Association ◘ Public Citizen ◘ Sagebrush Sea Campaign ◘ San Juan Citizens Alliance ◘ Sierra Club ◘ Southern Utah Wilderness Alliance ◘ Sustainable Obtainable Solutions ◘ The Wilderness Society ◘ Western Watersheds Project ◘ Wilderness Workshop ◘ Wyoming Outdoor Council

February 3, 2006

NEPA Draft Report Comments
c/o NEPA Task Force
Committee on Resources
1324 Longworth House Office Building

Dear NEPA Task Force:

Please accept these comments on behalf of the undersigned organizations and the millions of citizens we represent. We appreciate the opportunity to provide our comments on the NEPA Task Force staff report entitled Initial Findings and Draft Recommendations (Report). The draft proposals put forth by the Task Force will degrade environmental protection and stifle the voice of the public by impeding the exchange of information concerning proposed federal projects that impact the environment. The ultimate result of these recommendations will be heightened controversy and an increase in the likelihood of litigation and delay.

Comments on Findings

The Executive Summary bills the Report as an "initial view on the ways to improve NEPA" and as a summary of the comments and testimony provided during the seven field hearings held around the country. The Report distills the views expressed in these seven hearings into two camps: those who wish to retain the status quo (environmental groups) and those who seek improvements to the Act (everyone else). This is an inaccurate characterization of the record. First, there is a broad range of interests beyond "environmentalists" who testified that NEPA should not be amended. In September 2005, ten former Chairs and General Counsels of the President's Council on Environmental Quality stated their support for NEPA. In addition, nearly 200 law professors submitted extensive testimony that NEPA should not be amended and

suggested several non-legislative methods to improve NEPA implementation. Moreover, representatives from business, local governments and tribes, a western Governor's office and a rancher all testified concerning their desire to retain NEPA unchanged.[1]

Second, a distinction must be made between *amending* NEPA and thinking creatively about ways to *improve the implementation* of NEPA. Indeed, many suggestions have been made on how to improve NEPA implementation while retaining the integrity of the statute. See, NEPA Under Siege, The Political Assault on the National Environmental Policy Act, Robert G. Dreher, Georgetown Environmental Law & Policy Institute (2005) at 20-24.

In addition to these overarching errors, the draft Findings are misleading in some other respects especially as they relate to litigation. The apparent premise of many of the recommendations is that NEPA leads to wasteful litigation, and therefore, we must limit who can litigate. That premise is wrong as the draft Report itself concedes. *See,* Report at 11-12. Yet, the draft report and initial findings persist on perpetuating the myth.

Similarly, the Report appears to imply that it is disrespectful or misplaced to suggest that agencies need a check via public and judicial involvement on their decision-making process. *See,* Report at 8-9. This notion represents a fundamental misunderstanding of congressional intent in enacting NEPA. One respected jurist has noted,

> It is the premise of NEPA that environmental matters are likely to be of secondary concern to agencies whose primary missions are nonenvironmental. NEPA looks toward having environmental factors play a central role in the decisions of such agencies. This goal does not mean environmental considerations are to be more important than every nonenvironmental agency mission; questions of housing, energy, and inflation might have equal claim or even higher priority. But it does mean that environmental factors must serve as significant inputs to governmental policy and must be weighed heavily in the decisional balance. It is the function of review under NEPA to ensure that this purpose is served. Harold Leventhal, Environmental Decisionmaking and the Role of the Courts, 122 U. Penn. L. R. 509, 515 (1974).

In other words, Congress was well aware that most agencies would downplay environmental concerns should they have the chance. It was for this very reason that Congress saw fit to enact NEPA in the first place.

In another example, in the discussion on NEPA litigation and the ability of interest groups to intervene, the Report quotes a witness who states that the Ninth Circuit Court of Appeals has "repeatedly held that industry parties cannot intervene as a right in NEPA

[1] For example, Paul Fish, President, Mountain Gear, Inc.; Joanna Prukop, Secretary of Energy, Minerals and Natural Resources, Office of Governor Richardson; Martin Heinrich, Albuquerque City Councilor, Albuquerque, NM; Calbert Seciwa, Zuni Tribe, Tempe, AZ; Tweeti Blancett, rancher, Aztec, NM.

cases[.]" Report at 12. This observation fails to recognize that there are two avenues for intervention in lawsuits under Federal Rule of Civil Procedure Rule 24 – intervention as of right under Rule 24(a), and permissive intervention under Rule 24(b). The courts understandably impose a higher standard on parties claiming a legal "right" to intervene under Rule 24(a) in order to limit the number of parties and allow efficient processing of cases.

Ninth Circuit case law interpreting Rule 24(a) provides a four-part test for intervention as of right, including a requirement that parties demonstrate that they have a "significantly protectable interest" relating to the property or transaction involved in the litigation. In NEPA cases, the Ninth Circuit has ruled that the federal government is the only proper defendant and that private parties, including conservation groups, cannot intervene as of right. *See Wetlands Action Network v. U.S. Army Corps of Engineers*, 222 F.3d 1105 (9th Cir. 2000); *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094 (9th Cir. 2002). Therefore, the draft Report is incorrect when it asserts that the Ninth Circuit's limits on intervention in NEPA cases only apply to industry groups.

The rules on permissive intervention pursuant to Rule 24(b), however, are much more lenient in granting intervention to interest groups who want to assert their views in NEPA cases and other litigation. For permissive intervention, an applicant's claim or defense simply has to have a "question of law or fact in common" with the main case. Therefore, there is already ample opportunity for industry groups and others to intervene in NEPA cases, and industry groups have not had a difficult time exercising this privilege. See *Ecology Center v. Austin*, 430 F.3d 1057 (9th Cir. 2005); *Neighbors of Cuddy Mountain v. Alexander*, 303 F.3d 1059 (9th Cir. 2002); *Idaho Sporting Congress v. Rittenhouse*, 305 F.3d 957 (9th Cir. 2002). Congress should not impose new burdens on the federal courts by limiting their discretion to decide when it is appropriate to grant intervenor status to interest groups in cases involving NEPA.

What is Missing

The Report's recommendations would eliminate opportunity for public involvement by truncating the very dialogue and information sharing that agencies need to make sound decisions and protect the public. But in addition to doing harm, the draft recommendations miss an opportunity to heed the advice and recommendations of previous Task Forces and reviewers. As noted above, we believe that there is a positive agenda for improving NEPA's implementation.

Heeding the Advice of Previous Reviews and Expert Analysis

In September 2005, ten former Chairs and General Counsel of the President's Council on Environmental Quality (CEQ) submitted a letter to Task Force Chair Cathy McMorris. The letter's authors represent decades of first-hand expertise and experience with NEPA under both Republican and Democratic Administrations. They are, indisputably, experts on NEPA and agency implementation of NEPA. With remarkable foresight of what the Task Force might ultimately recommend, these NEPA experts specifically urged the Task Force to reject the very type of proposals the Task Force recommends here.

> Measures to exempt certain agencies and programs from NEPA, to restrict or eliminate alternatives analysis, or to limit the public's right to participate in the NEPA process threaten NEPA's vital role in promoting responsible government decision-making. We urge you and the other members of the Task Force to support the basic principles of NEPA and reject proposals that would weaken or undermine NEPA.[2]

These experts went on to articulate three critical principles of NEPA. They are worth repeating in full here as they serve as credible touchstones for analyzing the Task Force's draft recommendations.

> First, consideration of the impacts of proposed government actions on the quality of the human environment is essential to responsible government decision-making. Government projects and programs have effects on the environment with important consequences for every American, and those impacts should be carefully weighed by public officials before taking action. Environmental impact analysis is thus not an impediment to responsible government action; it is a prerequisite for it.
>
> Second, analysis of alternatives to an agency's proposed course of action is the heart of meaningful environmental review. Review of reasonable alternatives allows agencies to evaluate systematically the potential effects of their decisions and to assess how they can better protect the environment while still fully implementing their primary missions.
>
> Third, the public plays an indispensable role in the NEPA process. Public comments inform agencies of environmental impacts that they may have misunderstood or failed to recognize, and often provide valuable insights for reshaping proposed projects to minimize their adverse environmental effects. The public also serves as a watchdog ensuring that Federal agencies fulfill their responsibilities under the law. Public participation under NEPA supports the democratic process by allowing citizens to communicate with and influence government actions that directly affect their health and well-being.

We have found that in nearly all instances, the Report's recommendations run directly counter to this expert advice.

Strengthening the Link Between Section 101 Vision and Section 102 Process

In 1998 Congress established the United States Institute for Environmental Conflict Resolution to assist the federal government in implementing Section 101 of NEPA by "providing assessment, mediation, and their related services to resolve environmental disputes involving" federal agencies. P.L. 105-156, Sec. 4(4)(amending the Morris K.

[2] Letter from Russell Train, Russell Peterson, John Busterud, Charles Warren, J. Gustave Speth, Michael Deland, Kathleen McGinty, George Frampton, Gary Widman, & Nick Yost to Cathy McMorris, Sept. 19, 2005.

Udall Scholarships and Excellence in National Environmental and Native American Public Policy Act of 1992, 20 U.S.C. §5604). This very specific direction was a result of Congressional recognition that Section 101 of the Act, which contains the Act's visionary goals and purposes, is the soul of NEPA. Section 102, in contrast, provides the action-forcing mechanism to fulfill section 101's farsighted policy.

Thoughtful analyses and consideration of NEPA effectiveness have repeatedly noted the importance of linking the goals and purposes of section 101 to the process mechanisms of section 102. *See*, Report and Recommendations on a NEPA Pilot Projects Initiative, U.S. Institute for Environmental Conflict Resolution (2001), Appendix B; testimony of Thomas Jensen to NEPA Task Force, Spokane, WA (Apr. 23, 2005) available at http://resourcescommittee.house.gov/nepataskforce/archives/thomasjensen.pdf. If Section 101 of NEPA is not integrated into the decision-making process, the EIS process may be viewed as merely a procedural hurdle to be surmounted before proceeding with an already planned or envisioned agenda. Acting as if the NEPA analysis is an end in itself rather than a tool to enhance and improve decision making is not what Congress intended. One NEPA scholar summarizes the irony this way: "[I]f [Section 101 of NEPA] were completely internalized by agencies from day one, comprehensive environmental quality would be the top priority in decision making. This hopeful scenario was a primary reason for creating the EIS. There might be very few extensive EISs deemed necessary if significant impacts were addressed immediately or avoided altogether." The National Environmental Policy Act, Matthew J. Lindstrom (2001) at 64.

Unfortunately, the draft Report makes no acknowledgement of and offers no recommendations for strengthening the link between sections 101 and 102. Instead, the draft Report maintains a narrow interpretation of NEPA as an Act that is wholly concerned with process, contrary to the original Congressional intent.

Fiscal Responsibility

The issue of providing adequate resources for NEPA compliance has been raised by every entity that ever considered NEPA compliance—from CEQ to Congress to stakeholders. Yet, NEPA funding continues to decline. *See,* NEPA in the Agencies – 2002: A Report to the Natural Resources Council of America (Oct. 2002); NEPA Under Siege at 23-24 (citing to Army Corps' civil works program reductions in FTE's from 12 to 3 and Department of Energy Environmental Office FTE reduction from 26 to 14); GAO Report No. 03-534 at 6 (69% of highway project stakeholders identify the lack of sufficient agency staff as the cause of delays in environmental reviews).

Rather than address head-on this oft-repeated recommendation to improve NEPA implementation, the Report ducks all fiscal responsibility and makes the remarkable suggestion that more funding is not the solution because it could result in less on-the-ground protection. The reports and recommendations of prior task forces and expert analyses make specific, concrete recommendations from agency practitioners to ensure that federal funds are spent wisely, including increased staffing within CEQ to provide guidance and training to agency staff on many of the very technical issues highlighted elsewhere in the Report as needing further explanation. (As discussed in more detail

below, recommendation 9.2 tasks CEQ with studying current staffing issues. But it is already well documented that more resources are needed; what is needed is not more studies, but more resources.)

The Report misses the fundamental rationale behind increased funding: an agency that is strapped for resources and expertise is forced to default to a mentality of "bullet proofing" its NEPA analysis which leads to delay and inefficiencies. If an agency does not have sufficient information, competent managerial direction or technical knowledge—because of lack of staffing and expertise—the only option is to throw in everything you can think of. CEQ's regulations emphasize that "NEPA's purpose is not to generate paperwork—even excellent paperwork—but to foster excellent action." 40 C.F.R. § 1500.1(c). The straightforward and, again, often-repeated solution to this dilemma is not to disembowel the very guts of the analysis, but to provide those who conduct the analysis with adequate resources and tools. Our national treasures, communities and public health are worth additional FTEs.

Comments on Draft Recommendations

The Report's recommendations take us in the wrong direction. With few exceptions, the recommendations reduce, rather than enhance, public information and public involvement.

Recommendations 1.1, 1.2, 1.3 and 1.4

Recommendation 1.1: Amend NEPA to limit the applicability of the statute by re-defining "major federal action."

The Report recommends radically altering perhaps the single most important threshold definition in NEPA—what constitutes a "major federal action." The new definition would encompass only "new and continuing projects that would require substantial planning, time, resources, or expenditures." It is unclear why the Task Force staff deems this change necessary, but it is clear that it would turn NEPA on its head.

Rather than focusing on impacts to the environment—as is the core principal of NEPA—the Report's recommendation introduces extraneous elements, such as cost and time that cloud at best and disregard at worst the core question: does the action have a significant impact on the quality of the human environment. Citizens, from county commissioners to private property owners, value having a say in federal government decisions that could significantly affect them. This recommendation would reduce public involvement by removing many government actions from the scope of NEPA.

CEQ regulations currently provide guidance on what constitute both "major federal action" and its equally important qualifier "significantly affecting the quality of the human environment." *See* 40 C.F.R. §§ 1508.18, 1508.27. In addition, thirty years of case law have provided useful, uniform guideposts for the applications of these terms. Ultimately, the determination of what constitutes "major federal action significantly affecting the quality of the human environment" is a factual determination that depends

on the circumstances of the particular action. Introducing new, undefined terms such as "substantial planning" will only serve to produce additional litigation seeking to clarify the new definition.

Recommendation 1.2: Amend NEPA to add mandatory timelines for the completion of NEPA documents.

This recommendation would create a statutory limit for completion of Environmental Impact Statements (EIS) (18 months) and Environmental Assessments (EA) (9 months). Unless an agency receives a "written determination" from CEQ that these arbitrary time frames will not be met, all analysis will be "considered completed" at the conclusion of the allotted time.

This proposal would change NEPA to a voluntary obligation. An agency might choose to delay the NEPA process until the deadline, declare that no more analysis is required, and the NEPA process would be deemed complete even if no public documents have been released or public comments made. Instituting arbitrary one-size fits all timelines, even with the occasional "extension," is a bad idea. Every project and analysis is unique under NEPA and this recommendation will lead to rushed, inadequate analyses, or in some cases, no analysis at all.

Further, it is unclear who would ask for the "written determination" (would the agency request dispensation from CEQ or would CEQ be responsible for monitoring an agency's progress?) or what the written determination would consist of (would it simply be a statement of fact, e.g., the agency will not meet the deadline, or would it evaluate certain criteria?). In addition to this host of unanswered procedural questions, this provision introduces yet another paper-work obligation for understaffed and resource-strapped agencies. And to what good?

Agencies cannot improve the speed with which they complete NEPA analysis simply by the imposition of an arbitrary deadline; they will require additional resources to reduce the time they spend on an analysis. An example of this can be found in federal agency compliance with Freedom of Information Act (FOIA) deadlines. Congress imposed upon federal agencies strict deadlines on when they must respond to FOIA requests. More often than not, however, agencies do not have adequate staff and resources to respond to requests by the deadlines. As a result, mistrust and frustration from all parties abounds, as does litigation brought by frustrated parties, public interest groups and businesses seeking to enforce the deadlines. It is not difficult to envision a similar scenario should arbitrary deadlines be imposed on NEPA analysis.

The solution to the "delay" problem is not to impose arbitrary deadlines or to restrict the public process, but to provide agencies, including CEQ, with the resources they need to effectively and efficiently evaluate the environmental impacts of proposed projects.

Recommendation 1.3: Amend NEPA to create unambiguous criteria for the use of Categorical Exclusions, Environmental Assessments, and Environmental Impact Statements.

This recommendation would amend NEPA to "create unambiguous criteria for the use of" categorical exclusions, environmental assessments, and environmental impact statements, and to "provide a clear differentiation between the requirement for EA's and EIS's." It further suggests amending NEPA to provide that temporary activities "or other activities where the environmental impacts are clearly minimal" will be categorically excluded "unless the agency has compelling evidence to utilize another process."

This recommendation is unnecessary. Both NEPA and the CEQ already provide a clear process for agencies to sort proposed actions into one of three classes: (i) those which are categorically excluded from environmental analysis; (ii) those which will be the subject of an EA; or (iii) those that will be the subject of an EIS. *See,* 40 C.F.R. § 1501.4(a) and (b). Under these regulations agencies must establish lists of actions that presumptively fall into each class. *See,* 40 C.F.R. § 1507.3(b).

This process is straightforward and operates efficiently. Pursuant to 40 C.F.R. § 1507.3(b)), federal agencies have promulgated NEPA regulations listing specific activities that will presumptively be required to be evaluated in an EIS**.** *See, e.g.*, 33 C.F.R. § 230.6 (Corps of Engineers regulations listing several actions that will normally require preparation of an EIS).

Second, the CEQ regulations direct agencies to designate types of actions as categorical exclusions if they do not by their nature generate significant impacts. 40 C.F.R. § 1508.4. The CEQ regulation defines "categorical exclusion" as "a category of actions which do not individually or cumulatively have a significant effect on the human environment." 40 C.F.R. § 1508.4. Federal agencies have promulgated regulations implementing NEPA that specifically list actions that will be deemed categorically excluded from environmental analysis. *See, e.g.*, 33 C.F.R. § 230.9 (Corps of Engineers NEPA regulations listing numerous specific activities such as minor access roads, boat ramps, and minor maintenance dredging using existing disposal sites as categorical exclusions).

Finally, all actions which are neither categorically excluded on the one hand, nor normally subject to an EIS on the other hand, will be the subject of an EA. 40 C.F.R. § 1501.4(b). The CEQ guidance also provides that agencies shall decide whether or not an EIS is required based on the results of the EA. 40 C.F.R. § 1501.4(c).

The case law developed since NEPA was enacted provides numerous precedents that apply the statutory language and the CEQ guidance to a wide range of factual situations. These cases address whether a particular action triggers the requirement of Section 102(2)(C) for an EIS, whether an EA is sufficient, and a host of other related questions. *See, e.g., Department of Transportation v. Public Citizen,* 541 U.S. 752 (2004).

The final part of draft recommendation 1.3 would – in the absence of "compelling evidence" – categorically exclude from environmental analysis all "temporary" activities and "other activities where the environmental impacts are clearly minimal." This suggestion is problematic for several reasons.

First, this suggestion would impose a new burden on federal agencies and the public when they seek to uncover the impacts of an action. This approach would tip the scales heavily in favor of the presumption that no environmental analysis would occur for any of these kinds of activities. This, in turn, would completely reverse the existing presumption under NEPA that permits agencies to decide not to prepare an EIS only where they demonstrate convincingly that impacts are not significant. *See Humane Society of the U.S. v. Hodel*, 840 F. 2d 45, 62 (D.C. Cir. 1988).

Second, some "temporary" activities can produce significant adverse environmental effects. Depending on the span of time used to define the term "temporary," such activities can include the seasonal practice of burning crops – with attendant severe air pollution problems and adverse health effects. Such activities can also include short-duration dredging and disposal activities of navigation channels – with their own attendant adverse impacts on marine life.

Finally, this suggestion is unmoored to any definition of "minimal" or "temporary," and will inevitably invite or require litigation to determine when it may be applied to a particular action. Existing CEQ guidance (quoted above) already defines categorical exclusions by reference to whether the activity in question creates "significant" effects. 40 C.F.R. § 1508.4. The CEQ guidance also defines the term "significant" in some detail, invoking both the "context" and the "intensity" of the action. 40 C.F.R. § 1508.27. Numerous cases over the past thirty years have provided additional gloss on this definition. Switching the focus now to whether an action is "temporary" or generates "minimal" impacts will discard several decades of established case law that guides these decisions today in favor of an untested, new process.

Recommendation 1.4: Amend NEPA to address supplemental NEPA documents. This recommendation would limit the use of supplemental documentation absent a showing that an agency has made "substantial changes in the proposed actions that are relevant to environmental concerns" and that there are "significant new circumstances or information" relevant to the environmental concerns.

There is no need to amend NEPA to address supplemental NEPA documents. Existing CEQ regulations already make it clear that supplementation is only required if there are substantial changes in the agency action or significant new information relevant to environmental concerns. 40 C.F.R. § 1502.9(c). Note, however, that the draft proposal changes the "or" in existing regulation to an "and". It is unclear if this was an intentional change or an oversight. If the intent is to mirror existing regulation, this would need to be amended; if it was a deliberate change, it is inappropriate.

In addition, this recommendation arbitrarily eliminates a portion of CEQ's regulations concerning when it is appropriate to supplement. These regulations provide that an agency may prepare supplements when it determines that the purposes of the Act will be furthered by doing so; shall introduce a supplement into its administrative record; and, shall generally prepare and circulate a supplement in the same fashion as its draft and

final statements were prepared and circulated. These common-sense provisions allow the agency to obtain, review and consider new information on the potential environmental impacts of an action and thus allows for a more thorough decision-making process. If the agency no longer has the discretion to voluntarily supplement the information it uses to make the final decision on how to proceed, knowingly harmful projects may be allowed to proceed simply because important, relevant information was received after an arbitrary cut-off date.

Recommendations 2.1 and 2.2, "Enhancing Public Participation"

These recommendations reduce, rather than enhance, public participation.

Recommendation 2.1: Direct CEQ to prepare regulations giving weight to localized comments.
This recommendation would require CEQ to adopt regulations requiring that "issues and concerns raised by local interests should be weighted more than comments from outside groups and individuals who are not directly affected by that proposal."

The undersigned organizations submitting these comments represent millions of our members who are "local interests." We recognize that often locals have on-the-ground knowledge that is important to decision-makers and other members of the public. Their input should be heard. But so too should the input of every other member of the public who cares enough about a particular project or proposal to participate in the process. It is not so important who provides input, but rather what the value of that perspective or new information is to the process of considering impacts to our communities. Public input does not require agencies to change their actions under NEPA, but agencies should consider all factors raised by any interested party in evaluating their proposed actions under NEPA.

It runs counter to the purpose and intent of NEPA to suggest that the issues and concerns of one particular group of commentators should be weighted more (or less) than comments from another group or individual. NEPA applies to *federal* actions, more often than not involving federal *public* lands that belong to *all* Americans. Time and time again NEPA commentators, including stakeholders and practitioners, have underscored the importance of public involvement from the full range of interested parties. To exclude, explicitly or implicitly by making their participation less important any particular interest group, risks the agency not adequately considering potentially critical information.

In addition, it is uncertain how an agency or a court would determine who is "affected" by a proposal. As noted above, federal public lands are owned by all Americans. It logically follows that everyone who visits or plans to visit, for example, Grand Canyon National Park is "directly affected" by a proposal to build a dam in the park. Additional controversial, undefined and ambiguous litmus tests are not conducive to "enhancing" NEPA and will inevitably lead to more, not less, litigation as the courts are forced to sort out what it means to "give weight" to comments and who is and who is not "directly

affected" by a given proposal. While concerns of local interests are critically important to good federal decisions, so are other perspectives.

Recommendation 2.2: Amend NEPA to codify the EIS page limits set forth in 40 CFR 1502.7.
This recommendation would amend NEPA to codify existing CEQ guidance that final EISs shall "normally" be less than 150 pages and complex proposals less than 300 pages.

Perhaps the authors of the Report anticipate that a shorter document is more accessible. But if the analysis is shortchanged or truncated simply to meet required page limits, the analysis and the public's understanding of the project will both suffer. Rather, the Task Force should support the recommendations from earlier reviews of NEPA implementation that emphasize the importance of quality over quantity and address the root causes of overly long analyses, such as insufficient resources that force an agency to "throw in the kitchen sink" at the last minute rather than provide quality analysis.

Recommendations 3.1, 3.2

Recommendation 3.1: Amend NEPA to grant tribal, state, local and political subdivision stakeholders cooperating agency status.
This recommendation would amend NEPA to grant tribal, state and local stakeholders cooperating agency status.

The input of state, local and tribal agencies is important to informed decision-making. This is recognized by existing regulations that provide formal "cooperating agency status" to appropriate federal, state, or local agencies or tribes. 40 C.F.R. §§ 1501.6, 1508.5. The regulations explicitly state that "[a] State or local agency of similar qualifications or, when the effects are on a reservation, an Indian Tribe, may by agreement with the lead agency become a cooperating agency." 40 C.F.R. § 1508.5. CEQ guidance urges federal agencies to actively solicit the participation of state, local and tribal governments as "cooperating agencies" in implementing the environmental impact statement process under NEPA. CEQ Memorandum for Heads of Federal Agencies: Designation of Non-Federal Agencies to be Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act (July 28, 1999), available at http://ceq.eh.doe.gov/nepa/regs/guidance.html.

The recommendation would have two significant consequences. First, it would give an automatic right to participate as a cooperating agency, removing the discretion of the federal agency to manage the process. We take no position on whether a federal agency should be able to reject the request of a state, local or tribal government to participate as a cooperating agency. We do note that it is not clear from the recommendation whether the Task Force recognizes the significant financial and staffing obligations associated with cooperator status – obligations that not all qualified cooperating agencies may wish to meet in all cases.

Second, the recommendation would expand "cooperating agency status" beyond "agencies" to include all stakeholders. Cooperating agency status should be reserved for governmental entities. The purpose of the concept is to "emphasize agency cooperation early in the NEPA process." 40 C.F.R. § 1501.6. The process would become unmanageable if a federal agency were obligated to give "cooperating agency status" to all stakeholders who might request it. All stakeholders, of course, have a right to a meaningful role in decisions about how federal funds are spent and federal lands are managed. The vehicle for providing this participation, however, is not through cooperating agency status.

Recommendation 3.2: Direct CEQ to prepare regulations that allow existing state environmental review process to satisfy NEPA requirements.
This recommendation requires CEQ to prepare regulations that would permit state environmental reviews to satisfy NEPA requirements where the state reviews are "functionally equivalent" to NEPA requirements. The Task Force cites a 1973 court case involving a decision by the Environmental Protection Agency to ban the notorious pesticide DDT as the source of the "functional equivalence" doctrine.[3]

As an initial matter, we note that the Task Force recommends a separate study of NEPA's interaction with state "mini-NEPAs." *See* Report Recommendation 9.3. No recommendation should be proposed until the findings of such a study are thoroughly reviewed and considered.

Allowing another procedure to fulfill NEPA's carefully tailored requirements risks shortcutting either the substance of environmental review or the public's opportunities for involvement in that process. For that reason, the courts and Congress have invoked that doctrine very narrowly to exempt only EPA, the only "truly environmental" agency, from formal compliance with NEPA, and only where EPA's procedures ensure both full consideration of environmental impacts and opportunity for public involvement. *See, e.g., Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375 (D.C. Cir. 1973) (exempting EPA from NEPA's requirements when setting new source performance standards under the Clean Air Act). The courts have rejected claims by other federal agencies that their procedures were comparable to NEPA's, noting that other agencies have an inherent conflict between their substantive mission and protection of the environment. *E.g., Texas Committee on Natural Resources v. Bergland*, 573 F.2d 201 (5th Cir. 1978) (refusing to exempt Forest Service from NEPA because its duties include both conservation and a duty to ensure substantial yield from timber harvest); *Jones v. Gordon*, 621 F.Supp. 7, 13 (D. Alaska 1985), *aff'd n other grounds*, 792 F.2d 821 (9th Cir. 1986) ("the mere fact that an agency has been given the role of implementing an environmental statute is insufficient to invoke the 'functional equivalent' exception").

[3] *Environmental Defense Fund v. EPA*, 489 F.2d 1247, 1257 (D.C. Cir. 1973). This case is not, as the Task Force asserts, the source of the functional equivalence doctrine; it also does not involve state environmental review processes. However, it does discuss what is required for a federal agency to meet a "functional equivalence" standard in the circumstances of that particular case.

Moreover, it is difficult to see how adopting this recommendation would achieve the Task Force's stated goal of reducing NEPA litigation; in fact, the case the Task Force cites is a telling example of the kind of litigation this rule could inevitably produce. The court in that case found itself in the position of needing to carefully scrutinize two parallel processes in order to determine whether NEPA's general objectives had been met by the EPA's home-grown, non-NEPA process. Only after scrutinizing the agency's actions and finding that the EPA had in fact achieved all of NEPA's goals was the court able to rule that the agency had conducted the "functional equivalent" of a NEPA review.

Courts would face the same problems under the recommended rule. The recommended rule would inevitably require dramatic new judicial inquiry into whether a given state process really is "functionally equivalent" and what is required to achieve "functional equivalence" in any given case. Answering this question would require case-by-case comparisons of the state process with the NEPA process for each state in which challenged actions arose.

In addition, a given state procedure may result in the functional equivalent of a NEPA analysis for some projects, but not for others. It will be next to impossible for courts to establish a uniform rule to determine whether functional equivalence has been achieved with any given state's unique set of procedures.

It seems certain that any use of this proposed rule change to depart from NEPA's requirements would end up in court, and with potentially 50 different state processes, the litigation and judicial costs of this new rule would likely be enormous.

A better solution would be to emphasize to state and federal cooperating agencies that NEPA's central objective is to gather relevant information and make it available to the public in a meaningful fashion. If a state agency can gather the relevant information more efficiently, more cheaply, or more swiftly than can the federal agency, there is no reason the federal agency may not adopt that information and use it to satisfy its NEPA obligations. NEPA already explicitly allows for this. 42 U.S.C. § 4332(D). *See e.g.*, *Lange v. Brinegar*, 625 F.2d 812, 818-819 (9th Cir. 1980). But discarding the uniformity that NEPA provides in format, type of analysis, and public notice and comment periods cannot help but increase, rather than decrease, NEPA litigation.

Recommendations 4.1, 4.2

Recommendation 4.1: Amend NEPA to create a citizen suit provision.
To title this recommendation a "citizen suit provision" is a misnomer. Citizen suit provisions generally provide mechanisms for "citizens" to participate in a public process via legal means. The draft recommendations do nothing to enable the public to participate in and enforce NEPA and do everything to restrict when, where and who among the public can hold decision-makers accountable.

Restricting public access to a statute such as NEPA that depends in large part on public participation is significant. The Task Force staff apparently intends that an agency should have the discretion to move forward with a decision even in the face of clearly inaccurate or missing analysis, if that analysis is not challenged by the "right" person. Under this proposal, it is possible—if not required—for an agency to move forward with a project even if it potentially endangers public health and safety if, for example, essential information is disregarded or excluded due to restrictions on who may participate or appeal.

The proposed recommendation provides five particular mandates:

(1) Shifts the burden of proof to the public to demonstrate that the "evaluation" (one assumes this means the NEPA analysis but this is unclear) was not conducted using the best available information and science.

This suggestion is problematic for several reasons. "Best available information and science" is a phrase that has been interpreted in other contexts, like the ESA, to mean the agency need only review existing studies or data, and thus could be read to exempt federal agencies from having to conduct research or collect field data needed to fully understand the environmental effects of their proposed actions. NEPA has always been understood to require agencies to take steps to acquire needed scientific information, unless the information is exorbitantly expensive or impossible to obtain. Where information regarding the environmental impacts of an agency's proposed action is incomplete or unavailable, CEQ's regulations expressly require the agency to obtain the information if it is "essential to a reasoned choice among alternatives and the overall costs of obtaining it are not exorbitant." 40 C.F.R. § 1502.22(a). The agency may forgo obtaining such information only if the cost is exorbitant or the means to obtain it are unknown. 40 C.F.R. § 1502.22(b). It is particularly important to maintain the duty of federal agencies to conduct research if necessary to understand the likely consequences of their actions.

(2) Limit who may appeal to "parties involved in the process."

This suggestion uses ambiguous terms that could result in more litigation, not less. As most agency decisions requiring NEPA analysis do not have formal "parties," it is unclear what it means to be "involved in the process." Is this limited to cooperating agencies? Stakeholders? Those who participated by submitting testimony or comments at some stage in the process? This recommendation also ignores the fact that the Constitution and existing civil procedure rules already require plaintiffs to meet several jurisdictional standards including being able to articulate a redressable interest and a case and controversy. Plaintiffs must also meet common-law and statutory requirements to exhaust administrative remedies. That is, they must be affected by the decision in a manner that can be redressed by the court, and their concerns must have been raised during the administrative process.

(3) Forbid a federal agency from entering into a settlement agreement that would "forbid or severely limit activities for businesses that were not part of the initial lawsuit." Settlement discussions must include "the businesses and individuals that are affected by the settlement is [sic] sustained."

These provisions would throw into disarray over two hundred years of established jurisprudence and civil procedure regarding who may participate in legal proceedings and settlements. Moreover, this recommendation raises a number of additional serious concerns. First, it clearly tips the scales of justice in favor of business when there should be equality among all parties. Would the federal government be forced to litigate a case if these settlement standards are not met even if it is not in the best interest of the public to do so? Second, the breadth of these mandates is hard to fathom. It is easily possible that "affected" business and individuals could number in the tens of thousands, especially in cases of NEPA compliance with respect to activities affecting public lands. What mechanisms and/or resources are envisioned to enable an agency to comply with these sweeping mandates? Third, this proposal raises Constitutional concerns related to separation of powers. The existing rules for permissive intervention already provide courts authority to allow a broad range of affected persons and entities to participate. (see discussion at page 3).

(4) The fourth provision would introduce new legal guidelines regarding who has standing to initiate and/or participate in a legal proceeding. New requirements would consider the "challenger's relationship to the proposed federal action, the extent to which the challenger is directly impacted by the action, and whether the challenger was engaged in the NEPA process prior to filing the challenge."

Similar to the second recommendation, this proposal could dramatically alter established jurisprudence and introduce fodder for decades of additional litigation regarding who has legal standing to participate. In addition to a dramatic rise in litigation, citizens—regardless of their perspective—could lose an important avenue to ensure their community's interests are considered.

(5) The final "citizen suit" provision would restrict the time available to file a challenge to within 180 days of "notice of the final decision on the federal action."

This time period is too short for many members of the public even to be made aware of a pending action, never mind to prepare the material necessary to file a credible and efficient challenge. As noted above, it is a myth that NEPA and other federal regulations cause needless litigation; nevertheless, shortchanging the time allowed for the public to consider and appeal a project appears to be an unfortunate new legislative trend. The final SAFETEA-LU Transportation Reauthorization bill required that challenges to transportation project environmental approvals must be filed within 180 days after the issuance of a record of decision. This restriction will compel local officials and the public to file lawsuits to challenge projects often years before there is funding to build them, rather than working issues out during the negotiations over project funding. The

same problem is sure to arise in the context of other complex, long-term proposals such as dam and levee construction and oil and gas development. Restrictions on time frames available for filing challenges must take into account the availability of the administrative record and clearly articulate when the "clock" for such challenges starts to run.

Recommendation 4.2: Amend NEPA to add a requirement that agencies "pre-clear" projects.

The goal of this recommendation is unclear. CEQ is currently tasked with providing guidance to federal agencies related to all facets of NEPA including developments in case law. 40 C.F.R. § 1515.12. CEQ has called for additional resources and forums to discuss important NEPA case law. *See* The NEPA Task Force Report to the Council of Environmental Quality, Modernizing NEPA Implementation (2003) at 86. We support the additional flow of information from CEQ to decision-makers. But it is a mystery what is meant by the title of this recommendation and the suggestion the agencies "pre-clear" projects. With whom? By what procedure? One interpretation is that the rule would require agencies to obtain clearance from CEQ on some or all NEPA documents before they are made public or finalized; such a requirement would be burdensome on CEQ and greatly increase delays.

Recommendations 5.1, 5.2, 5.3 –Alternatives Analysis

The alternatives analysis has been called the linchpin of the environmental impact statement. There is no hard and fast definition of what constitutes a reasonable range of alternatives, primarily because that determination depends on the nature and facts of the proposal. The Supreme Court early on recognized the futility of trying to find a one-size-fits-all definition:

> [A]s should be obvious even upon a moment's reflection, the term "alternatives" is not self-defining. To make an impact statement something more than an exercise in frivolous boilerplate the concept of alternatives must be bounded by some notion of feasibility.

Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 551 (1978). Courts have, however, provided significant guideposts. For example, it is established that the alternatives discussion in an EIS need not consider alternatives "whose effect cannot be reasonably ascertained, and whose implementation is deemed remote and speculative." *Life of the Land v. Brinegar*, 485 F. 2d, 460, 472 (9th Cir. 1973). In addition, courts have suggested that, to be reasonable, the suggested alternatives must meet the goals of the proposed action. *See City of Carmel-by-the-Sea v. United States Dep't of Transp.*, 42 F.3d 517, 524-25 (9th Cir. 1997) (the stated goal of a project necessarily dictates the range of reasonable alternatives); *Idaho Conservation League v. Muma*, 956 F. 2d 1508, 1522 (9th Cir. 1992)(the Forest Service is entitled to identify some criteria for limiting alternatives studied in a timber harvest EIS); *National Wildlife Fed'n v. Federal Energy Regulatory Comm'n*, 912 F.2d 1471, 1485 (D.C. Cir. 1990)(an alternative that would not satisfy the water supply goal of the proposal is not a reasonable alternative).

Existing CEQ guidance also provides direction to agencies:

> In determining the scope of alternatives to be considered, the emphasis is on what is "reasonable" rather than on whether the proponent or applicant likes or is itself capable of carrying out a particular alternative. Reasonable alternatives include those that are practical or feasible from the technical and economic standpoint and using common sense, rather than simply desirable from the standpoint of the applicant. Council on Environmental Quality, *Forty Questions Memorandum*, 46 Fed. Reg. 18026 (1981), at 2a.

Rather than recognizing Justice Rehnquist's "rule of reason" approach first articulated in *Vermont Yankee*, the draft Report's recommendations arbitrarily bind the decision-maker's flexibility, leaving both the federal agencies and the public without sufficient information.

Recommendation 5.1: Amend NEPA to require that "reasonable alternatives" analyzed in NEPA documents be limited to those which are economically and technically feasible.

This recommendation would radically alter the nature of the alternatives analysis by limiting alternatives to those that "are supported by feasibility and engineering studies" and those "capable of being implemented after taking into account: a) cost, b) existing technologies, and c) socioeconomic consequences (e.g., loss of jobs and overall impact on a community)."

As discussed above, the breadth and scope of the alternatives analysis is not without bounds; agencies abide by the rule of reason. However, agencies have historically tended to restrict available alternatives unnecessarily. This recommendation would further that tendency by allowing agencies to disregard any suggested alternative that was not supported by "feasibility and engineering studies." Hardly any ordinary citizen and few organizations have the technical or financial resources to prepare such studies. On the other hand, corporate interests that have an economic stake in the outcome of the process may well consider it worthwhile to invest in feasibility and engineering studies in order to compel the agency to consider alternatives that would boost corporate profits.

In addition to tilting the alternatives analysis in favor of corporate interests that can fund "feasibility and engineering studies," this recommendation turns on its head the order of the decision-making process. The proposal permits an agency to preclude certain alternatives based on economic factors *prior* to the decision-making process. In essence the agency would be deciding how society is better served, e.g., balancing economic factors and environmental factors before the public has an opportunity to learn about the full spectrum of reasonable alternatives. This approach would transform the NEPA analysis process into an exercise of self-justification, not decision-making.

Moreover, restricting the range of alternatives studied leaves the agencies with a fixed base of knowledge, thereby ensuring that the same problems will always be met with the same solutions.

Recommendation 5.2: Amend NEPA to clarify that the alternatives analysis must include consideration of the environmental impact of not taking an action on any proposed project.
The recommendation makes two changes to the evaluation of a "no-action alternative" already required by CEQ.

First, the recommendation mandates that the no-action alternative require "an extensive discussion." Existing CEQ regulations require that the no-action alternative generally receive detailed evaluation in NEPA documents since it serves as the environmental baseline for comparison with the action alternatives. 40 C.F.R. § 1502.14 (a)(an agency shall "[r]igorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated."). It is not clear how the first part of the Task Force staff's proposal would change existing law.

However, the second part of the proposal is problematic. It would "require" the no-action alternative to be rejected "if on balance the impacts of not undertaking a project would outweigh the impacts of executing the project or decision." In addition to introducing a new, vague, undefined and controversial "balancing test," this requirement mandates an outcome that essentially obliterates the independence of an agency's decision-making authority. The whole point of NEPA is to enable an agency to evaluate the pros, cons and alternatives to a proposed project or decision and to enable that agency to make an independent determination. Furthermore, the proposed balancing test does not take into account public involvement; under such a test the agency could be legally compelled to proceed with a project even if it is overwhelmingly opposed by the public.

Recommendation 5.3: Direct CEQ to promulgate regulations to make mitigation proposals mandatory.
A mechanism is needed to ensure that promises to engage in mitigation are actually kept. We support this recommendation though we believe it can be accomplished without promulgating new regulations.

<u>Recommendations 6.1, 6.2</u>

Recommendation 6.1: Direct CEQ to promulgate regulations to encourage more consultation with stakeholders.
Increased *and early* communication among all stakeholders and decision-makers will improve NEPA's implementation. CEQ regulations and guidance already encourage communication with stakeholders. Agencies need the resources to make such enhanced communication a reality. It is unclear what would be entailed in the recommended requirement that agencies "periodically consult in a formal sense with interested parties throughout the NEPA process." CEQ already requires formal consultation with interested parties through public procedures including scoping and public comment on draft EISs. If this recommendation is meant to establish formal consultation with a more limited group of "interested parties," it is highly inappropriate. Any new consultations would need to be open dialogues and accessible to the full range of local, state and

national "interested parties." Such consultations could not supplant existing mechanisms for public involvement.

Recommendation 6.2: Amend NEPA to codify CEQ regulation 1501.5 regarding lead agencies.
It is unclear why the Task Force staff deems this change necessary. The existing regulation provides all of the authority any agency needs to determine lead agencies. Little case law exists on this regulation largely because the few courts that have considered it have deemed it unambiguous authority for one agency to take the lead so that others need not duplicate efforts.

Recommendations 7.1, 7.2

Recommendation 7.1: Amend NEPA to create a "NEPA Ombudsman" within CEQ.
This recommendation would create a new NEPA Ombudsman with "decision making authority to resolve conflicts within the NEPA process" with the purpose "to provide offset the [sic] pressure put on agencies by stakeholders and allow the agency to focus on consideration of environment [sic] impacts of proposed actions."

CEQ has long called for resources sufficient to enable it to provide more training and guidance for federal agencies, particularly on difficult technical issues. Further, CEQ serves as an important safety valve in its role in dispute resolution. 40 C.F.R. § 1504. However, it appears that this recommendation would instill in one staff position at CEQ "decision-making authority" as opposed to authority to interpret, guide, and train agency personnel. It is not clear what is meant by "conflict within the NEPA process." Certainly, it is appropriate for CEQ to monitor developments in NEPA implementation and case law and provide guidance to agencies should differing practices or interpretations develop. But it would be unusual for CEQ to supplant an agency's decision-making role, as it is the agency that typically has the expertise to make the on-the-ground decisions that affect its proposed action and the environment.

Recommendation 7.2: Direct CEQ to control NEPA-related costs.
CEQ is charged with the obligation of "assessing NEPA costs and bringing a recommendation to Congress for some cost ceiling policies." Like so many of the draft recommendations, it is unclear what is actually envisioned by this very general statement. Efficient use of NEPA resources by agencies will benefit everyone by improving the quality of NEPA analysis; however, just as arbitrary time lines or document limits are inappropriate, so are "cost ceilings" that are not bounded by a paramount goal of quality in the NEPA process.

Recommendations 8.1, 8.2

CEQ regulations define cumulative impact as:

> the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future

> actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time. 40 C.F.R. § 1508.7.

In 1997, CEQ issued further guidance on considering cumulative impacts. Council on Environmental Quality, Considering Cumulative Effects Under the National Environmental Policy Act (1997). CEQ re-emphasized that the goal of any analysis under NEPA including the cumulative effects analysis is "a better decision, rather than a perfect cumulative effects analysis." *Id.* at p. vii. The guidance describes eight principles for improved cumulative effects analysis and requests that agencies take an earlier and more coordinated approach to examining past, present and future actions.

Recommendation 8.1: Amend NEPA to clarify how agencies would evaluate the effect of past actions for assessing cumulative impacts.
This recommendation would amend NEPA to "clarify how agencies would evaluate the effect of past actions for assessing cumulative impacts." Under this proposal "an agency's assessment of existing environmental conditions will serve as the methodology to account for past actions."

This recommendation is susceptible to distinctly different interpretations. Interpreted one way, it suggests that an agency should develop methods to account for environmental damage done by prior actions and include a report on that damage in its description of the cumulative impacts of a proposed action. Interpreted another way, it could suggest that the agency should treat the existing environment as the baseline for starting the analysis of "cumulative" effects. This latter approach would run the risk that agencies could minimize or ignore the impacts of prior actions. Such an interpretation would undermine the NEPA requirement to assess cumulative impacts and would effectively dispose of current CEQ regulations and guidance, as well as established case law.

The CEQ regulations interpreting NEPA (which are entitled to "substantial deference" per *Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979)) make clear that an EIS must consider the cumulative impacts of a proposed action with previous impacts on the affected environment. *See* 40 C.F.R. § 1508.25(a)(2), (c). The regulations define "cumulative impact" as "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions." 40 C.F.R. § 1508.7.

CEQ guidance emphasizes that a cumulative impacts analysis must consider the effects of past actions on the resource to be affected by the proposed action. In "Considering Cumulative Effects Under the National Environmental Policy Act" (CEQ 1997), CEQ set out several principles of cumulative effects analysis, including "cumulative effects are caused by the aggregate of past, present, and reasonably foreseeable future actions." Id. at 8, Table 1-2, No. 1.

The case law makes clear that agencies must consider the cumulative environmental impacts of their proposed actions. *See, e.g., Kleppe v. Sierra Club*, 427 U.S. 390, 410, 413 (1976); *Natural Resources Defense Council, Inc. v. Hodel*, 865 F. 2d 288, 297-298 (D.C. Cir. 1988). The cases also note that agencies cannot ignore the existing condition of the affected environment caused by past actions when conducting a cumulative effects analysis. *See Roanoke River Basin Assoc. v. Hudson*, 940 F. 2d 58, 65 (4th Cir. 1991) (agency has a duty to "consider the cumulative effects of the [action] with other existing or foreseeable environmental conditions").

This recommendation could undermine an important element of the NEPA analysis. The requirement that federal agencies consider past actions that have impacted a particular area ensures that the total number of actions taken in that area will be documented and assessed. To amend NEPA in a way that could allow agencies to avoid this important step would remove a vital element of the NEPA process. This recommendation should not serve as a tool for reversing existing law that requires agencies to consider the effects of past actions when assessing the cumulative impacts of proposed new actions.

To the extent that this recommendation is a reaction to the Ninth Circuit Court of Appeals decision in *Lands Council v. Powell*, 395 F.3d 1019 (9th Cir. 2005), CEQ issued guidance ("Guidance on the consideration of past actions in cumulative effects analysis" June 24, 2005) that should have fully resolved any concerns raised by the Ninth Circuit's decision. There is no need for legislation.

Recommendation 8.2: Direct CEQ to promulgate regulations to make clear which types of future actions are appropriate for consideration under the cumulative impact analysis.

This recommendation would alter the existing CEQ regulation to "focus analysis of future impacts on concrete proposed actions rather than actions that are reasonably foreseeable."

This suggestion would put blinders on agencies by limiting their ability to account for the impact of future action that, even though likely, had not been officially proposed. It is unclear what constitutes a "concrete proposed action" versus one that is "reasonably foreseeable." As the existing CEQ regulations make clear, even minor but collectively significant actions taken over time can have cumulative effects. In the absence of an analysis of the reasonably foreseeable cumulative impacts over time of major federal development decisions, neither the agencies, the public, nor especially local communities and citizens will be afforded the opportunity to foresee and plan for the potential multitude and magnitude of impacts to air, water, wildlife, historic and ecological values, and potentially severe socio-economic impacts that can and do accompany federal development decisions. As a consequence, agencies and local communities will be ill-prepared for the accumulating impacts over time that will occur if agency NEPA reviews are unnecessarily restricted.

The history of the Jonah gas field development in Wyoming is a good case in point. In the case of this large natural gas play on federal lands within Wyoming's Upper Green

River Valley, the BLM failed to anticipate the magnitude of development now taking place when it made its initial leasing decisions many years ago. Had the agency better anticipated the impact of this development prior to committing federal natural gas resources to development, policies might have been developed to require mitigation of some of the adverse impacts now harming the region's wildlife populations and local communities from the intense and unanticipated levels of natural gas development in the region.

Recommendations 9.1, 9.2, 9.3

Recommendation 9.1: CEQ study of NEPA's interaction with other Federal environmental laws.
This recommendation would require CEQ, within one year of the publication of the final Task Force recommendations, to complete a study that "evaluates how and whether NEPA and the body of environmental laws passed since its enactment interacts" and "determines the amount of duplication and overlap in the environmental evaluation process, and if so, how to eliminate or minimize the duplication. . .."

As a general principle, we agree that unnecessary duplication should be avoided. Moreover, it has been recognized that there is room for improvement in coordination among agencies. However, within the framework of federal environmental laws NEPA is not redundant and fulfills unique and critical roles. For example, no other process requires public involvement to the extent that NEPA does, and in fact, the successful implementation of many other key laws and regulations depend on NEPA for public involvement. Similarly, proposals involving highway construction, energy development or other resource-intensive projects involve compliance with a range of federal, state and local laws and regulations. NEPA regulations specify that to the fullest extent possible agencies must prepare an EIS concurrently with any environmental requirements. 40 C.F.R. § 1502.25. NEPA forms the framework for coordinating and demonstrating compliance with these requirements—a framework that can reduce duplication and streamline action when used properly. NEPA itself does not require compliance with other statutes, but serves as a critical "umbrella" statute.

Recommendation 9.2: CEQ Study of current Federal agency NEPA staffing issues.
Within one year of publication of the final recommendations, CEQ would be required to detail the "amount and experience of NEPA staff at key Federal agencies" and will "recommend measures necessary to recruit and retain experienced staff." As noted previously, it is well documented that shortages in staffing and expertise are rife within the agencies. What is needed are not more studies, but rather a firm commitment from Task Force members that they will work with their colleagues to secure additional funding.

Recommendation 9.3 CEQ study of NEPA's interaction with state "mini-NEPAs" and similar laws.
While this recommendation calls for a study, we note that recommendation 3.2 seems to put the cart before the horse and assume that it is appropriate to allow state "mini-

NEPAs" to satisfy NEPA. No proposal should be made until the completion of a thorough study. There is a vast discrepancy among state NEPA laws. Some states limit their review only to specific subjects, for example. Levels of public notice and involvement vary dramatically as well.

Conclusion

We reiterate the recommendation of 10 former CEQ Chairs and General Counsel, as well as over 200 law professors and dozens of witnesses who testified at the field hearings that NEPA does not need amending and any proposal to do so should be rejected. Proposals to limit public access to information or to the decision-making process must also be rejected. Likewise, proposals that curtail the alternatives analysis, eliminate a reasonable range of alternatives or an agency's consideration of cumulative or future impacts, or establish arbitrary time lines should also be rejected.

We are disappointed that the Task Force staff's initial recommendations do not reflect the advice and proactive suggestions made by NEPA experts and practitioners on how to improve NEPA implementation. We believe that there is positive agenda for improving NEPA implementation, but these Initial Findings and Recommendations are ill-advised and would result in a less effective and more cumbersome NEPA process.

Sincerely,

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